BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

RICHARD BRADBURY, Claimant, vs. THE ANDERSONS, INC., Employer, AIU INSURANCE CO., Insurance Carrier, Defendants.	:	File No. 22700285.01 ARBITRATION DECISION Head Note Nos.: 1402.30; 1402.40; 1804; 2209; 2501; 2502; 2907

STATEMENT OF THE CASE

Richard Bradbury, claimant, filed a petition for arbitration against The Andersons, Inc., as the employer and AIU Insurance Company as its workers' compensation insurance carrier. This case came before the undersigned for an arbitration hearing on March 13, 2023.

Pursuant to an order from the Iowa Workers' Compensation Commissioner, this case was heard via videoconference using Zoom. Claimant appeared remotely via Zoom, as did all other participants, including the court reporter.

The parties filed a hearing report prior to the commencement of the hearing. On the hearing report, the parties entered into numerous stipulations. Those stipulations were accepted and no factual or legal issues relative to the parties' stipulations will be made or discussed. The parties are now bound by their stipulations.

The evidentiary record includes Joint Exhibits 1 through 8, Claimant's Exhibits 1 through 5, as well as Defendants' Exhibits A through J. All exhibits were received without objection.

Claimant testified on his own behalf. No other witnesses testified on behalf of claimant. Defendants called Richard Jackson, Liza Arnett, Tracy Morris, and Lana Sellner to testify. The evidentiary record closed at the conclusion of the March 13, 2023 arbitration hearing.

However, counsel for the parties requested an opportunity to file post-hearing briefs. This request was granted and both parties filed briefs simultaneously on April 21, 2023. The case was considered fully submitted to the undersigned on that date.

ISSUES

The parties submitted the following disputed issues for resolution:

1. Whether claimant sustained an injury that arose out of and in the course of his employment on February 21, 2022, including a claim that he sustained a cumulative trauma injury that manifested on that date.

2. Whether the alleged work injury caused permanent disability.

3. Whether the permanent disability, if any, should be compensated on an industrial disability basis or is limited to a functional impairment rating.

4. The extent of claimant's entitlement to permanent disability benefits, including a claim that claimant sustained permanent total disability.

5. The proper commencement date for permanent disability benefits.

6. Whether claimant is entitled to payment or reimbursement for past medical expenses.

7. Whether claimant is entitled to reimbursement of his independent medical evaluation fees.

8. Whether costs should be assessed against either party and, if so, in what amount.

FINDINGS OF FACT

The undersigned, having considered all of the evidence and testimony in the record, finds:

Richard Bradbury, claimant, is a 62-year-old man, who lives in Salix, Iowa. Mr. Bradbury possesses a 9th grade education and has not obtained a GED since dropping out of high school. His work history is basically manual labor. He commenced working in 1975 with Manpower accepting temporary job assignments. He then worked as a carpenter for approximately two years before accepting a position at John Morrell performing meat packing jobs for approximately six years.

After John Morrell, Mr. Bradbury worked for a mobile home company setting, remodeling, and moving mobile homes. He worked as a self-employed contractor for approximately eight years before accepting a position with the employer's predecessor company in 1998. Mr. Bradbury worked for the predecessor and then for The

Andersons, Inc. (who purchased the business approximately six to seven years ago) since 1998.

Claimant worked at the employer's zinc fertilizer plant. For the majority of his time with the employer, claimant worked as a maintenance technician. In this position, claimant built catwalks, welded pipes, set tanks, boilers, fixed and maintained machinery, fabricated machine parts, as well as building structures for the company. Claimant described having to manipulate, lift, and move pumps that weighed between 80 and 300 pounds. The employer described certain machinery that is available to assist with lifts and moving larger items at this plant. However, claimant credibly testified that he had to manipulate and move this equipment by hand at times.

Mr. Bradbury alleges he sustained a cumulative low back injury as a result of his manual work activities at The Andersons, Inc. Claimant's low back troubles developed over time. He could not describe a specific date or incident that caused his injury. Medical records in 2015 described persistence of symptoms for the past seven or eight years. Mr. Bradbury required his first low back surgery in March 2015. Specifically, he submitted to a bilateral laminotomy and medial facetectomy at the L4-5 level on March 3, 2015. (Joint Exhibit 3, p. 41)

Claimant returned to work without restrictions after a six-week recovery period. Unfortunately, his symptoms returned. By August 2020, claimant described pain radiating down his legs to his feet and his physician recorded that claimant had been taking narcotics for a year. (Joint Ex. 2, p. 21) Mr. Bradbury submitted to a second low back surgery on October 6, 2020. Specifically, his surgeon performed an L2-4 laminectomy with medial facetectomies and foraminotomies from L2-5. Claimant reported resolution of symptoms in his leg, no low back pain, and was determined to be neurologically intact on November 6, 2020. (Joint Ex. 2, p. 34) Claimant was again off work for six weeks after this surgery and again returned to work for the employer without restrictions.

Unfortunately, claimant's improvement did not last. He again developed symptoms in his low back and radicular symptoms into his legs. By February 22, 2022, claimant had again been referred to a back surgeon and was being recommended to submit to another surgical procedure on his lumbar spine. (Joint Ex. 7, pp. 127-129) The surgeon opined that claimant had no other realistic options given the condition of his low back. (Joint Ex. 7, p. 129)

Claimant again consented and submitted to a third surgery on his low back on April 25, 2022. The third surgery was extensive, involving surgical approaches both from the front and back of claimant's lumbar spine. Specifically, John D. Hain, M.D., performed an anterior lumbar fusion from L2 through S1. This surgery involved anterior plating at the L5-S1 level as well as retention screws at the L2-3, L3-4, and L4-5 levels from an anterior position.

In the second phase of this surgery, Dr. Hain proceeded with a posterior approach and performed a decompression at the L4-5 and L5-S1 levels. He performed

facetectomies on the left from L2 through S1 and right-sided facetectomies at the L2-3 and L5-S1 levels. Dr. Hain also resected fractured spondylolysis segments from L4 through S1 and performed full decompressions of the L5 and S1 nerve roots bilaterally. Finally, Dr. Hain performed posterolateral fusions with pedicle screw insertions from L2 through S1. (Joint Ex. 7, pp. 146-148) Again, this two-phased lumbar surgery was extensive.

Unfortunately, claimant also developed abdominal complications following this third low back surgery. He sought additional treatment at the emergency room and required hospitalization to get his bowels working again after surgery. Claimant was off work for a period of time after this surgery. However, when claimant perceived his surgeon would release him to return to work, claimant elected to resign his employment rather than attempt a return to work.

The employer offered testimony from Tracy Morris, Rick Jackson, as well as Liza Arnett that the employer did not terminate claimant's employment. Instead, claimant resigned his employment. Claimant confirmed that he quit his job and was not terminated by the employer. (Transcript, pp. 38, 95, 104-105, 113) Claimant has not applied for any positions and does not intend to seek further employment since resigning his position with the employer. (Tr., pp. 40, 47-48, 120) He does not believe he could perform any jobs at The Andersons, nor any of the positions identified by defendants' vocational expert. (Tr., pp. 39-40)

The initial factual dispute is whether claimant's low back injury arises out of and in the course of his employment with the employer. Only one physician has offered a causation opinion. Claimant's independent medical evaluator, Robin L. Sassman, M.D., evaluated Mr. Bradbury on February 7, 2023.

Regarding the cause of claimant's low back injury, Dr. Sassman notes:

> I spent a significant amount of time discussing Mr. Bradbury's work at The Andersons. This work included the following activities: Building pumps, handrails, running pipe, plumbing, and moving motors. He states the pumps weighed 150-300 pounds and had to be lifted and carried manually, sometimes for long distances. He then had to work on the pump that was on the ground that required him to bend forward for extended periods of time. He states he would frequently have to stoop over to work on them and lift them. He also carried steel pipe long distances and up flights of stairs at times. Based on my understanding of the work activities he did at The Andersons, it is my opinion that his work activities were a substantial aggravating factor of his lumbar spinal stenosis necessitating the treatment and surgeries he had as outlined above. While he may have needed lumbar spine surgery at some point in the future due to the lumbar spinal stenosis absent his work activities, it is my opinion that his work activities accelerated the need for the surgeries, and thus, was a substantial aggravating factor of his lumbar spinal stenosis.

(Claimant's Ex. 3, p. 43)

Defendants offered no competing causation opinion. However, they challenge the accuracy of the history provided to and relied upon by Dr. Sassman. Defendants challenge whether the job performed by claimant required as much physical labor as he reported to Dr. Sassman. Mr. Jackson explained that other individuals were available at the plant to assist with any significant lifts or physical duties. (Tr., p. 85) He specifically disputed the job duties recorded by Dr. Sassman. Mr. Jackson specifically disputed whether claimant was required to repeatedly carry 80 to 300-pound pumps after he arrived at the employer in 2004. (Tr., p. 85)

Mr. Jackson also testified that Bobcats, forklifts, hoists, and booms were available to assist with heavier job duties at the employer's plant. (Tr., p. 87) However, he did acknowledge that there are a few pumps at the employer's plant where none of the mechanical lift assist equipment would reach and that employees had to perform team-lifts to move those pumps. (Tr., pp. 87-88) He explained that those lifts would only have to move the pumps 5-10 feet, however. (Tr., p. 88)

Mr. Jackson also disputed the length of time claimant would be required to bend or stoop over a piece of machinery. He testified that it would not be typical to be bent over a pump for three to four hours to work on it. Instead, if the repair took longer than 10-15 minutes, maintenance technicians would use a hoist and move the pump to the shop to work on it. (Tr., p. 88) Finally, Mr. Jackson disputed whether claimant was required to carry steel pipe long distances and up flights of stairs. Instead, he testified that claimant should not have to carry steel pipe. He explained that there were hoists available, as well as an electrical hoist that would transport the pipe to each of the floors of the plant since he worked at the plant in 2004. (Tr., p. 90)

I acknowledge that the claimant's description of his job duties to Dr. Sassman (or at least her understanding of that description) may have exaggerated the physical nature of claimant's daily tasks as a maintenance technician for the employer. On the other hand, the employer's testimony acknowledges that claimant was required to perform most of the job duties, just not as frequently or perhaps in the same manner as recorded by Dr. Sassman. Nevertheless, I find that claimant's job with this employer was physical in nature and required him to perform heavy lifting, bending, stooping, and other physical tasks.

Ultimately, there is only one physician that considered whether claimant's job duties materially aggravated his underlying spinal stenosis. Dr. Sassman's explanation is reasonable and rational. I ultimately accept Dr. Sassman's causation opinion as the most reasonable and credible explanation of claimant's need for a very extensive low back surgery in 2022. Having accepted her opinion, I find that claimant proved his work duties at The Andersons accelerated his underlying spinal stenosis resulting in the need for his three low back surgeries and specifically the extensive two-phase lumbar fusion performed in 2022. At the very least, I find that claimant's job duties and heavy work at the employer accelerated his symptoms and need for surgery. I specifically find that claimant's job duties materially aggravated his underlying spinal stenosis.

Similarly, I find that the medical expenses contained and summarized in Claimant's Exhibit 1 were causally related to or necessitated as a result of the claimant's low back injury described above. Defendants did not dispute the reasonableness of the submitted charges or the reasonableness and necessity of the treatment rendered. Having found that these medical charges are causally related to the work injury, I find that claimant has proven these charges are reasonable, necessary, and causally related to the February 21, 2022 cumulative work injury.

Two physicians have addressed claimant's residual functional abilities and loss. Specifically, Dr. Sassman opines that claimant achieved maximum medical improvement (MMI) on January 25, 2023. Dr. Sassman also recommended that claimant limit any pushing, pulling, lifting, or carrying to 10 pounds at waist level and on an occasional basis. She recommended against any lifting either below or above waist level and recommended claimant not lift away from his body. She also recommended that claimant not walk on uneven surfaces, that he neither crawl nor kneel and that he not use any vibratory tools. (Claimant's Ex. 3, p. 46) Dr. Sassman utilized the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition, and opined that claimant sustained a 35 percent permanent functional impairment of the whole person as a result of his low back injury and resulting surgeries. (Claimant's Ex. 3, p. 45)

Defendants sought an independent medical evaluation with a neurosurgeon, Chad D. Abernathey, M.D. Dr. Abernathey concurred that claimant was at MMI but differed slightly on the date of MMI. Dr. Abernathey opined that claimant achieved MMI on the date of his evaluation, February 27, 2023. He offered no explanation why MMI should be delayed beyond Dr. Sassman's date of January 25, 2023, as no further treatment occurred during the month before his evaluation.

Dr. Abernathey concurred with Dr. Sassman's permanent work restrictions for claimant. (Defendants' Ex. A, p. 9) Dr. Abernathey also agreed with Dr. Sassman's permanent impairment rating of a 35 percent permanent functional impairment rating. Ultimately, I accept Dr. Sassman's date for MMI as January 25, 2023. I accept the undisputed permanent restrictions outlined by Dr. Sassman as well as find that claimant proved he sustained a 35 percent permanent functional impairment of the whole person as a result of his work injury.

Both parties introduced vocational expert opinions regarding claimant's residual work abilities. Defendants retained a vocational expert, who interviewed claimant telephonically on January 17, 2023. (Defendants' Ex. B, pp. 17, 21) Defendants' vocational expert opined that job opportunities remain for claimant after his work injury and identified a few positions she believed were available. (Defendants' Ex. B)

Mr. Bradbury countered with a vocational expert of his own. Claimant's vocational expert reviewed his medical records and interviewed claimant telephonically. Claimant's vocational expert noted the work restrictions offered by Dr. Sassman. Given those work restrictions, claimant's vocational expert performed a transferable skills analysis and opined, "The number of employment possibilities, pre-injury, was 667 and

post-injury was 0. The percent of Loss Employment Opportunity is, therefore, estimated to be 100%." (Claimant's Ex. 4, p. 57)

Claimant's vocational expert explained:

> Not only is Mr. Bradbury precluded from returning to any jobs in his past relevant work history, his transferable skills are compromised significantly by the physician established restrictions to the extent that they are of no benefit to him. As such, he is limited to unskilled work. Unfortunately, sedentary, unskilled work, for the most part, does not afford an individual the opportunity to change positions frequently. Unskilled work is, for the most part, routine and repetitive and the worker typically does not have control over the amount and frequency of their sitting, standing and walking.

(Claimant's Ex. 4, p. 58)

Claimant's vocational expert also noted that the defense vocational expert did not have Dr. Sassman's restrictions available when she initially formulated her opinion. In response, defendants called their vocational expert, Lana Sellner, to testify at hearing. At trial, Ms. Sellner acknowledged that claimant sustained a substantial loss of earnings after his work injury. (Tr., p. 124) However, Ms. Sellner opines that claimant remains capable of performing positions as a cashier, driving positions, or security positions. (Tr., p. 121)

Ultimately, I do not find Ms. Sellner's opinions to be convincing in this record. Mr. Bradbury has no experience performing cashier positions, he credibly testified to significant difficulties driving a vehicle, and security positions do not likely permit alternation of sitting, standing, and walking as needed. Rather, there would likely be job demands of a security position that would require a security officer to sit for extended periods, walk to investigate things even if uncomfortable, and/or standing for periods even if it might be symptomatically better to sit or walk. Ultimately, I do not find Ms. Sellner's opinion to be the most credible and convincing opinion in this evidentiary record.

Instead, I accept the vocational opinion offered by claimant's expert. With this in mind, I also find that claimant proved he is permanently and totally disabled. Mr. Bradbury has limited education, limited training, and has worked basically manual labor jobs his entire working life. He now has significant work restrictions outlined by Dr. Sassman and agreed to by Dr. Abernathey. He has a significant functional disability, no further training, ongoing symptoms, and has proven by a preponderance of the evidence that he is wholly disabled from performing work that he would otherwise be qualified and physically capable of performing. I acknowledge the opinions of defendants' vocational expert but accept the conclusion and opinions of claimant's vocational expert as most credible and convincing in this record. Therefore, I find that Mr. Bradbury proved by a preponderance of the evidence that he is permanently and totally disabled.

CONCLUSIONS OF LAW

The claimant has the burden of proving by a preponderance of the evidence that the alleged injury actually occurred and that it both arose out of and in the course of the employment. Quaker Oats Co. v. Ciha, 552 N.W.2d 143 (Iowa 1996); Miedema v. Dial Corp., 551 N.W.2d 309 (Iowa 1996). The words "arising out of" refer to the cause or source of the injury. The words "in the course of" refer to the time, place, and circumstances of the injury. 2800 Corp. v. Fernandez, 528 N.W.2d 124 (Iowa 1995). An injury arises out of the employment when a causal relationship exists between the injury and the employment. Miedema, 551 N.W.2d 309. The injury must be a rational consequence of a hazard connected with the employment and not merely incidental to the employment. Koehler Elec. v. Wills, 608 N.W.2d 1 (Iowa 2000); Miedema, 551 N.W.2d 309. An injury occurs "in the course of" employment when it happens within a period of employment at a place where the employee reasonably may be when performing employment duties and while the employee is fulfilling those duties or doing an activity incidental to them. Ciha, 552 N.W.2d 143.

A personal injury contemplated by the workers' compensation law means an injury, the impairment of health or a disease resulting from an injury which comes about, not through the natural building up and tearing down of the human body, but because of trauma. The injury must be something that acts extraneously to the natural processes of nature and thereby impairs the health, interrupts or otherwise destroys or damages a part or all of the body. Although many injuries have a traumatic onset, there is no requirement for a special incident or an unusual occurrence. Injuries which result from cumulative trauma are compensable. Increased disability from a prior injury, even if brought about by further work, does not constitute a new injury, however. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); Ellingson v. Fleetguard, Inc., 599 N.W.2d 440 (Iowa 1999); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995); McKeever Custom Cabinets v. Smith, 379 N.W.2d 368 (Iowa 1985). An occupational disease covered by chapter 85A is specifically excluded from the definition of personal injury. Iowa Code section 85.61(4)(b); Iowa Code section 85A.8; Iowa Code section 85A.14.

While a claimant is not entitled to compensation for the results of a preexisting injury or disease, its mere existence at the time of a subsequent injury is not a defense. Rose v. John Deere Ottumwa Works, 247 Iowa 900, 76 N.W.2d 756 (1956). If the claimant had a preexisting condition or disability that is materially aggravated, accelerated, worsened or lighted up so that it results in disability, claimant is entitled to recover. Nicks v. Davenport Produce Co., 254 Iowa 130, 115 N.W.2d 812 (1962); Yeager v. Firestone Tire & Rubber Co., 253 Iowa 369, 112 N.W.2d 299 (1961).

The claimant has the burden of proving by a preponderance of the evidence that the injury is a proximate cause of the disability on which the claim is based. A cause is proximate if it is a substantial factor in bringing about the result; it need not be the only cause. A preponderance of the evidence exists when the causal connection is probable rather than merely possible. George A. Hormel & Co. v. Jordan, 569 N.W.2d 148 (Iowa

1997); Frye v. Smith-Doyle Contractors, 569 N.W.2d 154 (Iowa App. 1997); Sanchez v. Blue Bird Midwest, 554 N.W.2d 283 (Iowa App. 1996).

The question of causal connection is essentially within the domain of expert testimony. The expert medical evidence must be considered with all other evidence introduced bearing on the causal connection between the injury and the disability. Supportive lay testimony may be used to buttress the expert testimony and, therefore, is also relevant and material to the causation question. The weight to be given to an expert opinion is determined by the finder of fact and may be affected by the accuracy of the facts the expert relied upon as well as other surrounding circumstances. The expert opinion may be accepted or rejected, in whole or in part. St. Luke's Hosp. v. Gray, 604 N.W.2d 646 (Iowa 2000); IBP, Inc. v. Harpole, 621 N.W.2d 410 (Iowa 2001); Dunlavey v. Economy Fire and Cas. Co., 526 N.W.2d 845 (Iowa 1995). Miller v. Lauridsen Foods, Inc., 525 N.W.2d 417 (Iowa 1994). Unrebutted expert medical testimony cannot be summarily rejected. Poula v. Siouxland Wall & Ceiling, Inc., 516 N.W.2d 910 (Iowa App. 1994).

In this case, there is an unrebutted medical causation opinion offered by claimant's independent medical evaluator, Dr. Sassman. While defendants challenge the underlying factual assumptions of that opinion, I ultimately found the unrebutted medical causation opinion offered by Dr. Sassman to be credible and convincing. Having reached that finding, I similarly found that claimant proved his work duties accelerated his need for his low back surgeries. I specifically found that claimant proved his work activities materially aggravated his underlying spinal stenosis. Therefore, I conclude claimant proved by a preponderance of the evidence and carried his burden to establish that his injury arose out of and in the course of his employment.

Claimant's injury was a cumulative injury. Defendants did not challenge the manifestation date of that injury or issues related to notice or statute of limitations. Therefore, I conclude that the alleged injury date of February 21, 2022 is the date applicable and the appropriate cumulative injury date when claimant's low back injury manifested.

The next issue that must be addressed is whether claimant proved his injury caused permanent disability. In this instance, claimant's permanent disability is obvious. Once the determination is made that he proved an injury arising out of and in the course of his employment, it is obvious that injury caused permanent disability. Two physicians addressed the issue of MMI, permanent impairment, and permanent work restrictions. Both Dr. Sassman and Dr. Abernathey concur claimant is at MMI. I accepted Dr. Sassman's MMI date as accurate.

Both Dr. Sassman and Dr Abernathey concur claimant sustained a 35 percent permanent functional impairment as a result of his low back injury and surgeries. Both physicians also concur that claimant requires significant permanent work restrictions that make it obvious claimant lost future earning capacity and sustained a permanent disability as a result of his low back injury. Therefore, I conclude that claimant proved he sustained permanent disability as a result of his work injury.

Having reached this conclusion, I must address the issue of whether claimant's permanent disability should be compensated industrially or with functional disability. It is clear that claimant's injury is to his low back and that it is not a scheduled member injury as defined by the provisions of Iowa Code section 85.34(2)(a) through (u). Therefore, if compensated as a permanent partial disability, claimant's disability would be compensated under Iowa Code section 85.34(2)(v), which provides:

> In all cases of permanent partial disability other than those described or referred to in paragraphs "a" through "u," the compensation shall be paid during the number of weeks in relation to five hundred weeks as the reduction in the employee's earning capacity that the employee possessed when the injury occurred. . . .
>
> If an employee who is eligible for compensation under this paragraph returns to work or is offered work for which the employee receives or would receive the same or greater salary, wages, or earnings than the employee received at the time of the injury, the employee shall be compensated based only upon the employee's functional impairment resulting from the injury, and not in relation to the employee's earning capacity.

Claimant argues that his injury is to the low back. Accordingly, his permanent disability should be compensated industrially under Iowa Code section 85.34(2)(v). He contends that his voluntary termination should result in a finding and conclusion that he did not return to work and was not offered work at the same or greater salary. Mr. Bradbury relies upon Martinez v. Pavlich, Inc., File No. 5063900 (App. July 30, 2020). In Martinez, the Iowa Workers' Compensation Commissioner held that a claimant's recovery is limited to a functional award only if the claimant returns to work or is offered a return to work at the same or greater wages. If the claimant terminates their own employment, claimant argues the commissioner held the industrial method of permanent disability is utilized.

Defendants urge a contrary interpretation of Iowa Code section 85.34(2)(v). Defendants contend that the industrial disability methodology of compensation is only utilized if the claimant is "terminated from employment by that employer." Iowa Code section 85.34(2)(v). Defendants contend that the statutory language does not permit an industrial disability award when the claimant voluntarily terminates his or her own employment.

In reality, the case law in this area appears complicated and unsettled. In McCoy v. Menard, Inc., File No. 1651840.01 (App. April 2021), the commissioner awarded permanent partial disability based on a functional basis because the claimant's actual hours worked were reduced after the injury. In Barry v. John Deere Dubuque Works, File No. 21003269.01 (App. April 2022), the commissioner similarly appears to have held that the claimant's recovery was limited to a functional loss because his earnings at the time of his retirement were greater than his earnings at the time of his work injury. Specifically, the commissioner held, "John Deere did not terminate claimant's

employment. I find claimant's recovery is limited to his functional loss under Iowa Code section 85.34(2)(v) because the earnings he received after he returned to work following the injury were greater than the earnings he received at the time of the injury."

However, in Sallis v. City of Waterloo, File No. 1643953.01 (App. August 2022), permanent disability benefits were awarded on an industrial disability basis when the injured worker voluntarily retired from employment. Then in Hofer v. Lennox Industries, Inc., File No. 20003191.01 (App. June 2023), the commissioner held that a claimant's permanent partial disability recovery was limited to a functional disability award because the employee voluntarily retired, apparently unrelated to the work injury. Again, it appears that an overarching test or methodology for how or when an injured worker is compensated under Iowa Code section 85.34(2)(v) continues to develop and is being refined and articulated on a case-by-case basis.

Ultimately, however, I conclude that Iowa Code section 85.34(2)(v) does not apply in this case. Iowa Code section 85.34(2)(v) deals with injuries resulting in permanent partial disability. However, claimant contends he is entitled to an award of permanent total disability benefits in this case. Total disability does not mean a state of absolute helplessness. Permanent total disability occurs where the injury wholly disables the employee from performing work that the employee's experience, training, education, intelligence, and physical capacities would otherwise permit the employee to perform. See McSpadden v. Big Ben Coal Co., 288 N.W.2d 181 (Iowa 1980); Diederich v. Tri-City Ry. Co. of Iowa, 219 Iowa 587, 258 N.W. 899 (1935).

A finding that claimant could perform some work despite claimant's physical and educational limitations does not foreclose a finding of permanent total disability, however. See Chamberlin v. Ralston Purina, File No. 661698 (App. October 1987); Eastman v. Westway Trading Corp., II Iowa Industrial Commissioner Report 134 (App. May 1982).

Having found that claimant's work injury renders him wholly disabled and unable to perform work that his prior experience, training, education, intelligence, and physical capabilities would otherwise permit him to perform, I conclude claimant proved he was permanently and totally disabled. I reached this finding after considering the opinions of the medical experts as well as the competing vocational opinions in this record. Ultimately, I accepted the permanent work restrictions outlined by Dr. Sassman. I found that those restrictions rendered claimant incapable of performing work for which he would otherwise be qualified and capable. Ultimately, I accepted the opinion of claimant's vocational expert as the most credible and accurate, concluding now that claimant is permanently and totally disabled.

Since Iowa Code section 85.34(2)(v) applies to injuries resulting in permanent partial disability, it is not applicable to injuries resulting in permanent total disability. Instead, being rendered permanently and totally disabled, claimant is entitled to an award under Iowa Code section 85.34(3). Specifically, he is entitled to an award of weekly benefits that are payable "until the employee is no longer permanently and totally disabled." Iowa Code section 85.34(3)(a).

The parties submitted a dispute about the proper date for commencement of permanent disability benefits. Claimant asserts on the hearing report that the proper date for commencement of permanent disability benefits is January 25, 2023. This corresponds with Dr. Sassman's date for maximum medical improvement, which I found was accurate. Defendants offered no alternative date for commencement of permanent disability. Neither party briefed this issue. I conclude that claimant became permanently and totally disabled when he reached MMI on January 25, 2023 and that permanent total disability benefits commence on that date and continue through the date of hearing and into the future until claimant is no longer permanently and totally disabled.

Claimant also requests an award of past medical expenses. The employer shall furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, and hospital services and supplies for all conditions compensable under the workers' compensation law. The employer shall also allow reasonable and necessary transportation expenses incurred for those services. The employer has the right to choose the provider of care, except where the employer has denied liability for the injury. Section 85.27. Holbert v. Townsend Engineering Co., Thirty-second Biennial Report of the Industrial Commissioner 78 (Review-Reopening October 1975).

Mr. Bradbury introduced Claimant's Exhibit 1 to document the past medical expenses he claims. Defendants stipulate that the expenses sought were reasonable, as was the care provided. (Hearing Report) However, defendants' post-hearing brief argues that claimant failed to prove a compensable work injury that rose out of and in the course of employment. (Defendants' Post-Hearing Brief, p. 33) Therefore, defendants dispute the award of claimant's past medical expenses.

Having found and concluded that claimant proved a material aggravation such that his claimed treatment and injury arose out of and in the course of employment, I conclude that claimant established a causal connection between his claimed medical expenses and his work injury. I conclude claimant is entitled to an order directing defendants to pay outstanding medical expenses, reimburse claimant and/or any third-party payor for past medical expenses, and to generally hold claimant harmless for all medical expenses submitted in Claimant's Exhibit 1. Iowa Code section 85.27.

Mr. Bradbury also seeks reimbursement of the independent medical evaluation charges from Dr. Sassman. Iowa Code section 85.39 permits an employee to be reimbursed for subsequent examination by a physician of the employee's choice where an employer-retained physician has previously evaluated "permanent disability" and the employee believes that the initial evaluation is too low. The section also permits reimbursement for reasonably necessary transportation expenses incurred and for any wage loss occasioned by the employee attending the subsequent examination.

However, an "employer is only liable to reimburse an employee for the cost of an examination conducted . . . if the injury for which the employee is being examined is determined to be compensable." Iowa Code section 85.39(2). Defendants are

responsible only for reasonable fees associated with claimant's independent medical examination. Claimant has the burden of proving the reasonableness of the expenses incurred for the examination. See Schintgen v. Economy Fire & Casualty Co., File No. 855298 (App. April 26, 1991). The reasonableness of the fee "shall be based on the typical fee charged by a medical provider to perform an impairment rating in the local area where the examination is conducted." Iowa Code section 85.39(2).

In this instance, claimant has proven a compensable injury. Therefore, his claim for reimbursement of an examination fee can be considered. However, in this case, an evaluation of permanent impairment was not made by a physician chosen by the employer prior to Dr. Sassman's evaluation. Claimant cannot establish the pre-requisites of Iowa Code section 85.39(2) to qualify for reimbursement of Dr. Sassman's evaluation fee. Iowa Code section 85.39 (2017); Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 843 (Iowa 2015). I conclude that claimant is not entitled to be reimbursed for Dr. Sassman's fee pursuant to Iowa Code section 85.39.

The final disputed issue is whether costs should be assessed against either party. Costs are assessed at the discretion of the agency. Iowa Code section 86.40. In this case, claimant has proven a compensable work injury and is recovering both weekly and medical benefits. Exercising the agency's discretion, I conclude that it is appropriate to assess claimant's costs in some amount. Iowa Code section 86.40.

Claimant submitted his requested costs as Claimant's Exhibit 2. He seeks assessment of his filing fee ($100.30). This is a reasonable cost that is specifically permitted by 876 IAC 4.33(7). I conclude it is reasonable and appropriate to assess claimant's filing fee as a cost. Similarly, claimant seeks assessment of the cost of service of the petition upon defendants ($14.76). Again, this is a reasonable cost and is specifically permitted by 876 IAC 4.33(3). I conclude that the cost of service should be assessed as a cost against defendants.

Mr. Bradbury also seeks the cost of his deposition transcript ($181.00). Transcription costs are permitted costs pursuant to 876 IAC 4.33(2). I am not fond of the inclusion of deposition transcripts in evidentiary records where the witness also testifies at hearing. However, in this instance, defendants elected to introduce claimant's deposition transcript. It is, therefore, reasonable for claimant to seek reimbursement of the cost of his deposition transcript since defendants introduced it as an exhibit. I hereby assess the $181.00 cost of claimant's transcript against defendants. 876 IAC 4.33(2).

Claimant seeks the award of the cost of Dr. Sassman's IME report as well as the cost of the vocational expert report. Agency rule 876 IAC 4.33(6) permits assessment of "the reasonable costs of obtaining no more than two doctors' or practitioners' reports." However, the amount assessed as a cost is limited to the cost of producing the report for submission into evidence in lieu of the testimony of the expert. Des Moines Area Regional Transit Authority v. Young, 867 N.W.2d 839, 843 (Iowa 2015).

The invoice from claimant's vocational expert is contained at Claimant's Exhibit 2, page 30. It itemizes several portions of the expert's work. However, it lumps together all charges to "Complete data interpretation, analysis and synthesis and preparation of Report" as one fee. It is not possible to determine the specific portion of time, or the specific charges submitted solely for preparation of the vocational expert's report. Clearly, the expert knew how to itemize his statement but did not do so for the report fee. I decline to speculate on the fees associated with drafting the report in lieu of testimony and further decline to assess the vocational expert's fees as costs.

Similarly, Dr. Sassman's invoice includes six hours of charges for "Record review and report preparation time." Again, it is not clear from the invoice the amount of time or charges specific to the report preparation versus other professional duties. Once again, I decline to speculate on the specific amount of time spent preparing a report and decline to assess Dr. Sassman's report fee as a cost.

ORDER

THEREFORE, IT IS ORDERED:

Defendants shall pay claimant permanent total disability benefits on a weekly basis commencing on January 25, 2023, continuing through the date of the arbitration hearing, and continuing into the future until claimant is no longer permanently and totally disabled.

All weekly benefits shall be payable at the stipulated weekly rate of seven hundred thirty-three and 21/100 dollars ($733.21) per week.

Defendants are entitled to the stipulated credit for sick pay or disability income paid to claimant against the award of permanent total disability benefits.

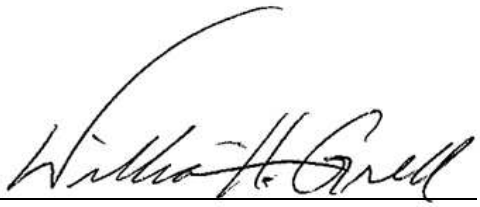
If additional past weekly benefits are owed after the aforementioned credit is taken and applied, interest shall be payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. See Gamble v. AG Leader Technology File No. 5054686 (App. Apr. 24, 2018).

Defendants are responsible for payment, reimbursement, and to hold claimant harmless for the past medical expenses incurred as contained and summarized in Claimant's Exhibit 1.

Defendants shall reimburse claimant's costs in the amount of two hundred ninety-six and 06/100 dollars ($296.06).

Defendants shall file subsequent reports of injury (SROI) as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this __29th___ day of August, 2023.



WILLIAM H. GRELL
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Brian Keit (via WCES)

Peter Thill (via WCES)

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or legal holiday.